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UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF WASHINGTON

UNITED STATES OF AMERICA,)	
)	No. 4:15-cr-6049-EFS-16
Plaintiff,)	
)	DEFENDANT EDGAR OMAR
vs.)	HERRERA FARIAS' REPLY TO
)	RESPONSE TO MOTION IN
EDGAR OMAR HERRERA FARIAS,)	LIMINE RE: MODUS
)	OPERANDI TESTIMONY
Defendant.)	Hearing: March 6, 2018 @ 9:30
)	a.m. at Richland
)	WITH ORAL ARGUMENT

The Defendant, Edgar Omar Herrera Farias, replies to the Government's Consolidated Response to Defendants' Motion in Limine ECF No. 650 as it pertains to law enforcement modus operandi experts.

The Government maintains that law enforcement may state opinions under FRE 701 because they are "permitted to draw certain conclusions based upon their training and experience" ECF No. 650 at 2. If the officers are relying on their specialized training and expertise, their opinions might come in because their "specialized knowledge will help the trier of fact to understand the evidence" but only if it is expert

1 testimony under FRE 702, not lay opinions under FRE 701. FRE 702(a). Lay opinions
2 under FRE 701 are “rationally based on the witness’ perception” and “not based on
3 scientific, technical or other specialized knowledge.” FRE 701(a) and (c). The
4 proposed officer testimony is not lay opinion.
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6 Therefore, any law enforcement modus operandi testimony must meet the
7 requirements of FRE 702. *Daubert v. Merrill Dow Pharmaceuticals, Inc.*, 509 U.S.
8 579 (1993).
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10 Moreover, the Court must consider the important role of FRE 403 by weighing
11 the probative value against the prejudicial effect of any proffered evidence before its
12 admission. *United States v. Sangrey*, 586 F.2d 1312, 1315 (9th Cir. 1978). The Court
13 must clearly demonstrate “that the question of prejudice figured crucially in the court’s
14 mind. *United States v. Verduzco*, 373 F.3d 1022, 1029 n. 2 (9th Cir. 2004).
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17 Here, the Government’s disclosures do not demonstrate how the modus
18 operandi expert “testimony helps the trier of fact to understand how ‘combinations of
19 seemingly innocuous events may indicate criminal behavior.’” *United States v.*
20 *Vallejo*, 237 F.3d 1008, 1016 (9th Cir. 2001), quoting *United States v. Johnson*, 735
21 F.2d 1200, 1202 (9th Cir. 1984). For example, the Government’s Supplemental as to
22 the Proposed Modus Operandi Expert talks in vague terms such as “pricing and
23 trafficking pattern of heroin” and Fentanyl will be explained without disclosing the
24 explanation and that Canadian Constable experts will “explain why” distribution hubs
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26

1 typically send product to Vancouver B.C. without disclosing “why.” ECF No. 595 at
2 4.

3 The Court should prohibit drug modus operandi testimony at trial.

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5 RESPECTFULLY submitted this 27th day of February 2018.

6 WALDO, SCHWEDA
7 & MONTGOMERY, P.S.
8 By: /s/ Peter S. Schweda
9 PETER S. SCHWEDA
10 Attorney for Defendant Herrera Farias
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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on February 27, 2018, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF System which will send notification of such filing to the following:

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